Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1976

No. 77-105

ROBERT PALAGONIA, et al.,

Plaintiffs,

ELLEN FINKELSTEIN, SIDNEY J. FINKELSTEIN, individually and as father and natural guardian of SHIRA FINKELSTEIN, an infant under the age of 21 years,

Petitioners,

vs.

TRANS WORLD AIRLINES, INC.,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

The respondent suggests that the Court does not have jurisdiction at this time because recovery may be obtained at the damage hearing for so-called physical injuries in the sum of $75,000 per plaintiff passenger, and thus theoretically the trial court would not be able to consider plaintiffs' further claims for mental anguish and mental injuries alone. The respondent is

disingenuous in making such contention to the Court because throughout all settlement discussions, both before the state court and in private, its offers of settlement have never exceeded several thousand dollars per passenger. Furthermore, it is quite obvious that it is an unnecessary burden on the Court and the parties to hold the damage trial twice just because such trial was not held under the proper substantive law of damages. Quite clearly, this case is ripe for review.

It is further suggested by the respondent that the Court should take no action and deny *certiorari* because in effect the obvious injustice resulting from denial of mental injuries alone by the state court would be corrected with respect to possible future claimants by the action of the United States Senate in ratifying Montreal Protocols 3 and 4 which revised the Warsaw Convention. The Senate Foreign Relations Committee in executive session on September 20, 1977 has deferred action on the Montreal Protocols 3 and 4 *sine die.*

The said Protocols purport to revise Paragraph 1 of Article 17 of the Warsaw Convention in both the French and English official versions in the same manner as did the Guatemala Protocol. See page 18 of petitioners' brief for text of such revision. It is noted that the French phrase "lesion corporelle," which is set forth in both the present official French text of the first paragraph of Article 17 of the Warsaw Convention is also contained in the official French text of the first paragraph of Article 17 as revised by the proposed Montreal Protocols 3 and 4. In the official English version of the first paragraph of Article 17 as revised by Montreal Protocols 3 and 4, the phrase "lesion corporeile" is translated by the phrase "personal injury"; whereas in the unofficial English translation of the existing first paragraph of Article 17 of the Warsaw Convention such phrase is translated as "bodily injury."

On July 26, 1977, hearings were held before the United States Senate Foreign Relations Committee with respect to the

ratification of the said Montreal Protocols 3 and 4. Submitted to the Senate Committee on Foreign Relations was a detailed "ARTICLE BY ARTICLE ANALYSIS" of the said proposed revisions to the Warsaw Convention. With respect to the change in translation of the phrase "lesion corporelle" from "bodily injury" to "personal injury" the following explanation was given:

> "The words 'personal injury' replace the phrase 'wounding . . . or any other bodily injury' in order to clarify the modern meaning of the French text. *See, e.g., Krystal v. British Overseas Airways Co.,* 403 F. Supp. 1322 (C.D. Cal. 1975); *Husserl v. Swiss Air Transport Co.,* 388 F. Supp. 1238 (S.D.N.Y. 1975) (awarding damages for mental anguish alone)." *DETAILED REPORT The Warsaw Convention as revised by Montreal Protocols 3 and 4* dated June 25, 1977, "ARTICLE BY ARTICLE ANALYSIS" at pages 11 and 12.

This report was prepared by: Paul B. Larsen, of the Office of General Counsel of the Department of Transportation; Bruce I. Selfon, Assistant Chief Counsel, Federal Aviation Administration, Department of Transportation; and Frank Willis (Chairman), Assistant Legal Advisor for African Affairs, Department of State. Other members of the United States delegation to the International Civil Aviation Organization whose work is summarized by the Report are representatives of the Civil Aeronautics Board, Air Transport Association and Treasury Department.

At the July 26, 1977 hearing before the United States Senate Foreign Relations Committee, Herbert J. Hansell, Legal Adviser, Department of State, submitted a written statement on behalf of the United States State Department concerning ratification of Montreal Protocols 3 and 4. He stated at page 7 of his written statement the following:

> "In almost every respect, these provisions of the Guatemala Protocol represent an agreement by the international aviation community to terms requested by the United States to up-date the Warsaw Convention."

The above quoted statement in the "ARTICLE BY ARTICLE ANALYSIS" explains that the words "personal injury" are being used in the official English version rather than "bodily injury" as contained in the former unofficial English version in order to clarify the text of the Treaty so as to make it conform with the proper existing construction of the law. Thus, the proposed change in text is not for the purpose of altering the substantive rights of the parties under such law, but rather to make clear the rights that passengers already have under the law. The change is thus declaratory of existing law; and if these Protocols to the Warsaw Convention are indeed ratified, their effect will be retrospective and not prospective as suggested by the respondent. See *Girard Inv. Co. v. Commissioner of Internal Revenue*, 122 F.2d 843, 846 (3d Cir. 1941), *cert. denied*, 314 U.S. 699, 62 S. Ct. 479 (1941) where Judge Clark writing for the Court stated the following with respect to the retrospective application of declaratory amendments of statutes:

> "If the existing is obscure anything subsequent can be interpreted either as a clarification or as a change. If the former, the effect is retrospective and therefore to be eschewed. It can, of course, be so stated and if it is, governs. One might prescribe this the *sine qua non*. In any event, caution has been indicated:
>
> 'Statutory construction is often aided by a consideration of later enactments which may clarify doubt as to the meaning of the earlier statute or correct manifest error in its administration. No rule of construction needs

> more careful application. Ordinarily, the deliberate selection of language differing from the language of previous acts indicates an intended change of the law. But no change may be intended; the later statute may be declaratory of the meaning of the previous law or a codification, or *recognition of a contemporaneous construction, crystallizing it into statutory law; it may be a clarification of an earlier act.*'" (emphasis added).

See also *F.H.A. v. Darlington, Inc.*, 358 U.S. 84, 90, 79 S. Ct. 141, 145 (1958).

Thus, it is the policy of the United States Government to provide for mental injuries alone under existing law. This submission by the representatives of the Executive Departments directly responsible for the implementation of the provisions of the Warsaw Convention, as modified by the Montreal Agreement, for the first time explains the change of language contained in the official English version of the Guatemala Protocol. It is submitted that this Court should support the construction of these Executive Departments. See *Factor v. Laubenheimer*, 290 U.S. 276, 54 S. Ct. 191 (1933).

Respondent's conclusion that the legislative history of Article 17 of the Warsaw Convention demonstrates that the drafters did not intend that there be recovery for fright or psychic trauma alone is a *non sequitor*. There is no explanation given in any of the convention proceedings for this change in the drafts. The court in *Rosman v. Trans World Airlines, Inc.*, 34 N.Y. 2d 385, 314 N.E. 2d 848 (1974), relied upon by the state court herein, clearly pointed out at pages 395, 854 of its decision that the legislative history was not supportive of the construction contended for by the respondent.

Furthermore, the reference to the statement of Juglart by

respondent at pages 8-9 of its brief is not correct. The correct translation of Juglart's statement is as follows:

> "It is regrettable, on the other hand, that no distinction is made between incapacities total or permanent and simple injuries, wounds or partial incapacities. Mental injury should even be the object of a special mention." (Juglart, *Traite Elementaire de Droit Aerien,* 330 (1952)).

Juglart obviously was considering better draftsmanship and did not mean to convey a conclusion that mental injuries alone were not recoverable. Juglart was not a member of the original drafting committee of the Warsaw Convention. However, Judge Otto Riese, whose writings indicating that mental injuries alone are recoverable referred to at pages 58-59 of the petition herein, was the German delegate to the 1929 Warsaw Convention.

The above stated position of the United States Government as to existing law has caused the petitioners herein to move for reargument in the state court of the denial of the petitioners' right to appeal to the New York Court of Appeals. Decision on such motion for reargument is pending, and it is requested that the Court defer decision on this petition pending decision of the state court on the motion.

CONCLUSION

It is submitted that the Warsaw-Montreal Regime provides recovery for mental injuries alone to the extent that such recovery is otherwise available in the State of New York. It is requested that the Court defer decision on this petition until such time that the motion for reargument of the denial of petitioners leave to appeal to the New York Court of Appeals is decided by the Appellate Division of the State of New York. And in the event that such leave is again denied, that this Court grant the petition for writ of certiorari. It is further requested, that the Court defer decision on the petition pending the receipt by the Court of a motion by the American Trial Lawyers Association to file an *amicus curiae* brief in support of the petition for writ of certiorari herein.

Respectfully submitted,

s/ Alvin H. Meadow
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September, 1977